FILED

941058 DEC 8 1994

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

WILLIAM DOUGLAS CARTER,

Petitioner,

V.

WILLIAM T. BURCH,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

John S. Edwards
Attorney at Law
725 Crestar Plaza
10 E. Franklin Road
Post Office Box 1179
Roanoke, Virginia 24006-1179
(703) 985-8625

Counsel for Petitioner

LANTAGNE DUPLICATING SERVICES
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

1. Whether a prosecutor is entitled to absolute prosecutorial immunity when he withholds materially exculpatory evidence pre-trial?

2. Whether a prosecutor is entitled to absolute prosecutorial immunity when he withholds materially exculpatory evidence first learned after the conviction?

3. Whether a prosecutor is entitled to absolute prosecutorial immunity when he conspires to fabricate evidence pre-trial?

LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the Fourth Circuit were the petitioner William Douglas Carter, the respondent William T. Burch, and Deputy Sheriff Vernon Beamer, defendant/appellee, Sheriff John R. Isom, and Deputy Sheriff Jeffrey Brown, defendants.

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The reported opinion of the United States Court of Appeals for the Fourth Circuit and the unreported opinions of the United States District Court for the Eastern District of Virginia are reprinted in the Appendix to this petition.

JURISDICTION

This suit was brought under the Civil Rights Act of 1871, 42 U.S.C. §1983. Subject matter jurisdiction in the district court was founded on 28 U.S.C. §1331, federal question. Appellate jurisdiction in the United States Court of Appeals was founded on 28 U.S.C. §1291, appeals from all final decisions of the district court. Jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Civil Rights Act of 1871, 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW.

The petitioner, William Douglas Carter ("Carter"), was once a successful, wealthy businessman living on a farm in Loudoun County, Virginia. On March 11, 1988, he was convicted and incarcerated on maliciously wounding and felony firearm charges growing out of the July 31, 1987 shooting of his ex-wife, Carole Vandergrift Carter. At the time of the shooting he was 55 years old. Almost four years later, on February 14, 1992, he was released from prison on a writ of habeas corpus when his conviction was overturned by the state court on the grounds that materially exculpatory evidence known by the authorities (the "Poppa evidence") had been withheld from him. At the conclusion of his new trial on July 28, 1992, he was acquitted by a jury of all charges.

On November 17, 1992, Carter filed his complaint in U.S. District Court for the Eastern District of Virginia, Alexandria Division, seeking redress for violations of his civil rights by defendants for conspiring and denying him his rights to due process of law at his first trial, thereby causing him to spend four years in prison. The complaint was amended by Order entered June 22, 1993. J.A. 104. The defendants named were William T. Burch, Commonwealth's Attorney for Loudoun County, who prosecuted Carter at the first trial, John R. Isom, Sheriff of Loudoun County, and Vernon Beamer and Jeffrey Brown, Deputy Sheriffs of Loudoun County.

On January 8, 1993, the court dismissed the complaint against defendant William T. Burch on the grounds of prosecutorial absolute immunity. Appendix at 21.

A jury trial began on July 6, 1993 against defendant Beamer, after dismissal of defendants Isom and Beamer on summary judgment. On July 8, 1993, the jury returned a verdict in favor of Carter on his civil rights claim against Beamer and awarded compensatory damages of $1.00.

On July 23, 1993, the court denied Carter's motion for a new trial or to amend the judgment to award at least the unrebutted special damages on the general verdict of liability against Beamer. The district court ruled the nominal damage award could be explained by the jury concluding that Deputy Sheriff Beamer was not a "proximate cause" of damages to the plaintiff because, under one scenario, prosecutor Burch was the proximate cause of withholding the materially exculpatory evidence. Appendix at 26.

On September 9, 1994, the Fourth Circuit affirmed the dismissal of prosecutor Burch on the grounds of absolute prosecutorial immunity and also affirmed the nominal verdict award of $1.00 against Deputy Sheriff Beamer. Appendix at 7-13.

In granting Burch absolute prosecutorial immunity for withholding materially exculpatory evidence, the court noted there was a conflict in the testimony as to when Burch first became aware of it, i.e., whether prior to the first trial or, as Burch testified, "several months" after Carter's conviction. The court reasoned that either way, Burch was absolutely immune.[1]

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[1] The nominal damage verdict against Beamer would not preclude a substantial damage award against Burch because, as the District Court and Fourth Circuit ruled, there

If Burch knew of the Poppa evidence before Carter's trial, "[t]he decision whether to turn this evidence over to defense counsel would have occurred after Carter's arrest, but before his conviction and is clearly part of the presentation of the State's case." Appendix at 12.

Alternatively, if Burch did not learn of the Poppa evidence until after Carter's conviction and thereafter withheld it, the court reasoned that he was still entitled to absolute immunity because at the time Burch was still involved in post-trial motions and the appeal as an advocate for the State. Appendix at 12.

The court also held that Burch's involvement in a conspiracy to fabricate testimony, as supported by the affidavit of Suzanne Culver, was absolutely immune because that involved "the presentation of false testimony in court." Appendix at 13.

B. STATEMENT OF FACTS.

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was evidence Beamer's actions, while violating Carter's constitutional rights, did not proximately cause his injuries. Appendix at 15 and 28-29. If Burch learned of the Poppa evidence pre-trial, he was a proximate cause of Carter's damages in being convicted in the first trial. Likewise, if Burch first learned of the Poppa evidence post-conviction, Carter was damaged by spending several more years in prison because of Burch's misconduct before he was given a new trial and acquitted.

1. Underlying Criminal Trial.

In the early morning hours of July 31, 1987, Carole Vandergrift Carter, the ex-wife of petitioner Carter, was shot and wounded by her own .38 caliber pistol in the bedroom of her home outside of Middleburg, Virginia. Later that day, Carter was arrested at his cottage in Saratoga Springs, New York on a warrant of malicious wounding of his ex-wife. In October 1987, he was indicted on charges of malicious wounding and use of a firearm in commission of a felony.

Respondent Burch prosecuted the case as Commonwealth's Attorney for Loudoun County, Virginia in a jury trial which began on March 8, 1988. In preparation for the case, Burch anticipated a defense of attempted suicide or self-inflicted wound. J.A. 59.

On March 11, 1988, the jury found Carter guilty of both charges. He was sentenced to 14 years in prison and immediately incarcerated. He remained incarcerated in the jails and prisons of the Commonwealth of Virginia until he was released on February 14, 1992 after being awarded a writ of habeas corpus.

2. The "Poppa Evidence."

On November 19, 1991, a deputy sheriff of Loudoun County, Douglas Poppa, came forth with evidence which lead to Carter's release from prison and a new trial. At the habeas corpus hearings on November 20, 1991 and January 7 and 8, 1992, and at the new trial in July 1992, Poppa testified that several months prior to the July 31, 1987 shooting, he was contacted by Carole Vandergrift Carter and interviewed for a potential job as a security bodyguard at her home. At the time

he had left the Sheriff's office for personal reasons.

During a lengthy interview in which she drove him to the estate and back to his home in Sterling, she spoke incessantly about how much she hated her ex-husband. Throughout the conversation she was high-strung, nervous, and extremely talkative. At one point she pulled out a Smith and Wesson .38 caliber revolver which she had recently purchase to show him. J.A. 123-24.

At another point in the conversation, speaking of her husband, she said, "I hate him so much . . . I would shoot myself even if I died if I could make it look like he did it so he would spend the rest of his life in jail, ruin the rest of his life." J.A. 129. Poppa decided not to take the security job she offered him.

3. Poppa Reported His Evidence To Deputy Sheriff Beamer.

Several months later, while watching the television news, Poppa learned of the July 31, 1987 shooting. J.A. 136. A couple of days later, he spoke with Captain Vernon Beamer, head of the Criminal Investigative Division of the Sheriff's Office, and asked about the investigation of the shooting of Carole Carter. Beamer told him she was shot with her own gun. He then related to Beamer that, a couple of months before, she had showed him that gun and she had wanted to hire him as a bodyguard, but that he had not taken the job.

Poppa went on to tell Beamer that Carole Carter had told him: "I hate my husband so much I would shoot myself, even if I died, if I could make it look like he did it, so he would ruin his life, spend the rest of his life in jail." J.A. 138. Beamer's response was that the case was "wrapped up" and they "got the

guy in New York or Canada." J.A. 138-39.

In September 1991 when Carter was being booked, Howard Fry, a former corrections officer in the jail of Loudoun County, overheard a conversation among Beamer and two other officers who were standing at the booking desk.

> I heard Vernon Beamer make the statement that one of his investigators had told him that Carter's wife would do anything to frame her husband up to and including shooting herself.

J.A. 259. One of them responded, "I hope that doesn't get out. It would blow your case." At that point, "all three nodded in agreement and kind of chuckled." J.A. 260.

Beamer did not turn Poppa's evidence over to the Commonwealth's Attorney's office.

4. Poppa Reported His Evidence to Respondent Burch.

Poppa returned to the Loudoun County Sheriff's Department in January 1988. According to him, in January or February 1988, he went to see Burch and told him everything he had previously told Beamer several months before concerning his interview with Carole Carter. In particular, he told Burch that Carole Carter said she would shoot herself and make it look like he did it in order to send him to jail and ruin his life, or words to that effect. J.A. 172-73. Burch replied he had "a lot of evidence" against Carter and it looked like the case was "wrapped up." J.A. 172.

According to respondent Burch, he did not learn of the

"Poppa evidence" until "several months" after Carter's conviction:

> I have a recollection of a conversation with Deputy Poppa after the trial of the case, sometime, I would say, several months after the trial of the case. I don't recall the exact context, or where it was, but it was to the effect that Deputy Poppa had some contact with the victim in this Carter case . . . prior to the shooting and that her mental state, she had struck as being suicidal, something along those lines . . ..

J.A. 62.

Burch acknowledged the Poppa evidence was exculpatory and discoverable by a criminal defendant. He agreed that, if related, he had a duty to turn over the Poppa evidence to the defense in accordance with *Brady v. Maryland* and his professional ethical obligations. J.A. 65-66.

In an affidavit Burch stated that post-trial motions extended until September 8, 1988 and the final order was entered on September 19, 1988. Burch wrote the Commonwealth's brief opposing Carter's petition for appeal. On June 14, 1989, the Virginia Court of Appeals awarded Carter an appeal, and thereafter the Attorney General's office handled the appeal of the case. J.A. 51

According to Burch, "sometime between Mr. Carter's conviction [March 11, 1988] and June 14, 1989, while I still represented the Commonwealth in Mr. Carter's prosecution, I had a conversation with Douglas Poppa that plaintiff alleges resulted in my coming into possession of exculpatory

information. I had no further conversations with Mr. Poppa concerning the Carter matter." J.A. 51.

Burch never turned over the "Poppa evidence" to Carter or his counsel. Carter was tried and convicted without knowing about Poppa or his evidence.

5. The Writ Of Habeas Corpus.

On February 6, 1992, the Circuit Court of Loudoun County granted Carter a writ of habeas corpus, ordered him released from prison, and overturned his conviction on the grounds that his due process rights were violated in connection with this prosecution and conviction.

Judge Arthur W. Sinclair held:

> [T]he police (sheriff's department) had knowledge of evidence which the Commonwealth's Attorney admits from the stand was exculpatory . . .. [T]he petitioner has proven by a preponderance of the evidence that material evidence of an exculpatory nature was not revealed to the defense upon request at the trial which resulted in his conviction and present incarceration.

J.A. 4-5.

6. Significance Of The Poppa Evidence.

The suppressed Poppa evidence was materially exculpatory and the outcome of the trial would have been different had he had it. J.A. 215-218. As explained by Carter's expert witnesses, there were two defense theories at the first trial: an alibi defense that Carter was on his way to his cottage

in Saratoga, New York, and not at the farm house in Loudoun County, Virginia at the time of the shooting, and that the shooting was self-inflicted. J.A. 211. The alibi defense was inconclusive because of conflicting evidence as to how long it would take to drive to his New York cottage. The defense testimony was it took ten hours or so and the prosecution's evidence was that it took about seven or eight hours. There was little or no evidence to support the self-inflicted wound theory at the first trial.

The prosecutor's evidence rested on the credibility of Carole Carter because there was no physical or other evidence he was in Carole's home the night of the shooting. Yet, at the first trial there was "very little evidence to impeach" Carole Carter's credibility. J.A. 212.

The Poppa evidence was "consistent" with the self-inflicted wound theory. Poppa described Carole as so "emotionally upset," so "irrational", and as hating her ex-husband so much that "she would be the kind of person" who would shoot herself. This was "considerably different" than the rational, controlled woman as portrayed in the first trial by the prosecution. This evidence "struck at the heart of her credibility," and showed her "intent" and "motive." J.A. 218.

Beamer's expert witnesses admitted the Poppa evidence was "exculpatory," but denied it was "materially exculpatory," i.e., evidence that would change the result of a trial. J.A. 405.

District Judge Bryan stated at a bench conference that the Poppa evidence was both exculpatory and material. "I think it's not only exculpatory, I think it's material, and I think that's a question for the Court. I think that." J.A. 305. Nevertheless, he left the question of materiality up to the jury. And the jury,

in finding Beamer liable, necessarily found the Poppa evidence to be materially exculpatory.

7. Conspiracy To Fabricate Evidence Prior To The First Trial.

Carter alleged that Burch also conspired to fabricate evidence prior to his first trial by coaching and instructing the witness Suzanne Culver to deny under oath that Carole Carter had told her shortly after the shooting that she was shot with her own .38 caliber pistol. At the time of the shooting, Culver was living in Carole's mansion. At trial, Culver falsely denied that Carole Carter had told her anything about the caliber of weapon used in the shooting. In May 1991, Culver came forward and admitted her perjury and stated in an affidavit and testified at the second trial that Burch had coached her to testify falsely at the first trial.

Suzanne Culver's testimony at the first trial denying that Carole Carter had told her anything about the caliber of the weapon was used to rebut the anticipated defense of self-inflicted wound. Due to the darkness of the room and the circumstances of the shooting, Carole likely would not have known the weapon was her own .38 caliber pistol unless she had used it to shoot herself.

It was also used to show that Carter's knowledge in the early afternoon of July 31, 1987 that Carole had been shot with a .38 caliber pistol evidenced his guilt and to rebut Carter's evidence that such knowledge was obtained innocently from his brother and his girlfriend, Rebecca Elgin, in the morning of the shooting. Elgin testified she received this information from Sheriff John Isom earlier that morning. In rebuttal, Isom falsely denied telling Elgin that Carole had been shot with a .38 caliber

pistol and testified he did not know the kind of weapon used in the shooting at the time he spoke with Elgin. J.A. 17.

The Court of Appeals of Virginia, in affirming Carter's original conviction, noted that his knowledge that Carole had been shot with a .38 caliber pistol "became a focal point in the jury trial." *Carter v. Commonwealth*, 393 S.E.2d 639, 641 (Va. App. 1990).

8. Damage Evidence.

Carter spent almost four years in prison -- from March 11, 1988 to February 14, 1992 -- as a result of his conviction. He endured great suffering in overcrowded, substandard jails and prisons during these years. J.A. 279-86. He also incurred $233,969.00 in expenses after his conviction through appeals, the habeas corpus proceeding and the new trial. J.A. 292. During his time in prison, he also earned virtually no income, whereas he had earned between $155,799 and $307,511 in each of the prior four years. An expert economist projected the present value of his lost earnings to be $1,940,047.00. J.A. 320.

REASONS FOR GRANTING THE WRIT

1. THE FOURTH CIRCUIT'S OPINION THAT PROSECUTOR BURCH IS ENTITLED TO ABSOLUTE IMMUNITY FOR WITHHOLDING MATERIALLY EXCULPATORY EVIDENCE IS A GRAVE MISAPPLICATION OF THIS COURT'S ANALYSIS THAT THE PROSECUTOR MUST CARRY THE BURDEN OF ESTABLISHING A PRE-1871 COMMON LAW IMMUNITY AND A POLICY JUSTIFICATION FOR IMMUNIZING THE CHALLENGED FUNCTION, THE FOURTH CIRCUIT OPINION CONFLICTS WITH SIXTH AND SEVENTH CIRCUIT OPINIONS THAT WITHHOLDING EVIDENCE PRE-TRIAL AND POST-TRIAL, RESPECTIVELY, IS NOT ABSOLUTE IMMUNE, AND REVIEW IS NECESSARY TO ADDRESS AND REMEDY A SERIOUS NATIONAL PROBLEM OF PROSECUTORS SUPPRESSING EXCULPATORY EVIDENCE.

This Court should grant a writ of certiorari in this case because the Fourth Circuit's opinion seriously misapplied this Court's analysis for determining absolute prosecutorial immunity as set forth in *Imbler v. Pachtman*, 424 U.S. 411 (1976); *Burns v. Reed* 500 U.S. 478 (1991); and *Buckley v. Fitzsimmons*, 509 U.S.___, 125 L.Ed. 2d 209, 113 S.Ct. 2606 (1993) that the prosecutor carries the burden of establishing a pre-1871 common law absolute immunity and a policy justification for

granting absolute immunity for the function performed. In addition, the Fourth Circuit's ruling is directly in conflict with the Sixth Circuit opinion in *Hilliard v. Williams*, 516 F.2d 1344 (6th Cir. 1975)(pre-trial suppression not absolutely immune) and the Seventh Circuit opinion in *Houston v. Partee*, 758 F. Supp. 1228 (N.D. Ill. 1991), *aff'd*, 978 F.2d 362 (7th Cir. 1992) *cert. denied* 507 U.S. ___, 123 L.Ed.2d 269, 113 S.Ct. 1647 (1993)(post-trial suppression not absolutely immune). Finally, because suppression of evidence by prosecutors, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and ethical cannons, is a serious national problem which Section 1983 liability can deter and remedy, this Court should correct the erroneous lower court opinion to prevent further misapplication of prosecutorial immunity standards and to discourage this serious prosecutorial abuse which strikes at the heart of the truth seeking function of the courts and denies justice to our citizens.

The Civil Rights Act of 1871, 42 U.S.C. §1983, grants no immunity to public officials by its own terms. Common law immunities existing when the statute was passed in 1871, however, are deemed included under the presumption the legislature did not intend to eliminate traditional common law immunities. *Imbler v. Pachtman*, 424 U.S. at 418; *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). The burden rests with the State official who seeks the protection of absolute immunity to justify it for the function performed, and this Court has been "quite sparing" in recognizing absolute immunity. *Forrester v. White*, 484 U.S. 219, 224 (1988). Qualified immunity "represents the norm" for executive officers. *Malley v. Briggs*, 475 U.S. 335, 340 (1986).

Without question, wilful withholding of materially exculpatory evidence by prosecutors severely injures the truth

seeking function of the judicial process and causes grave miscarriages of justice to citizens. It is also by definition outside the supervision and control of the judicial process when it occurs. *Imbler v. Pachtman*, 424 U.S. at 432-47 (White, J., concurring opinion)(absolute immunity does not extend to a prosecutor suppressing evidence, whether pre-trial or post-trial).

No pre-1871 case has been found which immunizes a prosecutor absolutely for suppressing evidence. At common law, absolute immunity was accorded prosecutors only in suits for malicious prosecution and defamation in court on the grounds that the decision to charge and conduct inside the court room should remain subject to independent judgment without fear of personal liability. *See e.g. Imbler v. Pachtman*, 424 U.S. at 420-24; *Burns v. Reed*, 500 U.S. at ___, 114 L.Ed. 2d at 557. Charging decisions and presentation of evidence are also subject to the adversarial process and under judicial supervision and control.

Thus, following pre-1871 common law precedent, this Court in *Imbler v. Pachtman* held that a prosecutor was immune from damage suits under Section 1983 "in initiating a prosecution and in presenting the State's case." 424 U.S. at 431. Common law immunity of prosecutors is based on the same considerations underlying common law immunity of judges and jurors acting within the scope of their duties, namely, the need for independence of judgment required by his public trust so he would not "shade his decisions" out of fear of civil liability. The adversary system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion "in the conduct of the trial and the presentation of evidence." *Id.* at 426.

The Court emphasized that immunity is based upon "the

functional nature of the activities" he performs rather than his status as a prosecutor. Thus, a prosecutor engaged in investigative or administrative activities has only qualified immunity comparable to that of a policeman. *Id.* at 430. Activity which is absolutely immune is only that which is "intimately associated with the judicial phase of the criminal process," i.e., initiating and presenting the prosecution's case at trial.

No issue of suppression of evidence was presented in *Imbler* or in this Court's subsequent decisions on prosecutorial immunity: *Burns v. Reed, supra* and *Buckley v. Fitzsimmons, supra*. Indeed, in *Buckley*, after the conviction, the prosecutor uncovered and turned over to the defense, and to the Governor considering the death sentence, new evidence corroborating Imbler's alibi defense and questioning the trustworthiness of the prosecution's primary eyewitness. 424 U.S. at 413. Unlike the present case, the prosecutor's disclosure of this exculpatory evidence gave the defendant an opportunity to bring it the judicial system which eventually granted him habeas corpus relief. Thus, by the prosecutor adhering to the ethical responsibility of disclosing exculpatory evidence, the judicial system was able to work and justice was accomplished.

As this present case dramatically demonstrates, when exculpatory evidence is suppressed, justice is denied. While evidence was withheld, Carter languished almost four long years in prison. Thus, full disclosure of exculpatory evidence must be fully encouraged by subjecting prosecutors who wilfully fail this duty to civil liability.

In *Burns v. Reed, supra*, this Court distinguished the prosecutor's out-of-court conduct of giving legal advice to the police, which was not absolutely immune, from the in-court

conduct of presenting evidence at a probable cause hearing to obtain a search warrant, which was absolutely immune. In that case, the prosecutor advised the police that they could interview a criminal suspect under hypnosis. While under hypnosis, the suspect made certain statements indicating she had multiple personalities, one of which shot and wounded her two sons while they slept. At a probable cause hearing before a judge to obtain a search warrant, the prosecutor presented evidence that the suspect had confessed, but failed to inform the judge that the confession was obtained under hypnosis or that she consistently denied shooting her sons.

Absolute immunity was granted for presenting evidence at the probable cause hearing because of the pre-1871 common law immunity for defamatory statements in a judicial proceeding. However, advising the police in the investigative phase of a criminal case is not so "intimately associated with the judicial phase of the criminal process" as to qualify for absolute immunity. 114 L.Ed.2d at 562-63.

The Court also noted that the absence of absolute immunity for giving legal advice may encourage prosecutors to consider their advice more carefully. It would also be "incongruous" to allow prosecutors to be absolutely immune for giving advice to the police, but allow only qualified immunity to the police for following that advice. *Id.* at 564.

Finally, the out-of-court activities of a prosecutor in giving legal advice to the police are not subject to the "crucible of the judicial process." 114 L.Ed.2d at 565. There are no safeguards to prevent abuse of power when the activity occurs outside judicial oversight. Similarly, the Attorney General was not absolutely immune from liability for authorizing a warrantless wire tape in *Mitchell v. Forsyth*, 472 U.S. 511

(1985) because he was not acting in a prosecutorial capacity, even though the evidence obtained might lead to a prosecution.

Most recently, in *Buckley v. Fitzsimmons, supra,* this Court held that a prosecutor was not absolutely immune for fabricating evidence during an investigation of a crime and defamation at a press conference announcing return of the indictment. The prosecutor was charged with "shopping" for an expert to fabricate evidence relating to a bootprint on the door of a murder victim's home to link the plaintiff to the crime. Both activities occurred outside the judicial proceeding and neither were protected by pre-1871 common law absolute immunity.

In the present case, Burch withheld from the courts and Carter the materially exculpatory Poppa evidence. According to Poppa, the evidence was given to Burch prior to the first trial. He told Burch the same information he had given several months before to Deputy Sheriff Beamer regarding Carole Carter's statement that she would shoot herself and frame her ex-husband. According to Burch, on the other hand, he first learned of the Poppa evidence "several months" after Carter's conviction while the case was involved in post-trial motions and on appeal.

Either way, suppression of materially exculpatory evidence is not entitled to absolute immunity because it undermines the truth seeking function of the judicial process and prevents the courts from adjudicating a just and fair decision to a citizen.

Moreover, turning over such evidence involves no "quasi-judicial" decision making, such as the decision to charge, and involves no advocacy function. It is a purely administrative function without which the judicial process is deprived of the

opportunity to do justice. Only when the evidence is turned over to the defense can it become subjected to the "crucible of the judicial process." *Burns v. Reed*, 114 L.Ed. 2d at 565. Only when the defense obtains the evidence can the prosecutor's function become advocacy.

Finally, suppression of materially exculpatory evidence can not be adequately remedied absent Section 1983 liability. Commentators have noted how widespread prosecutorial misconduct is and how little deterrence the alternatives of professional disciplinary action and criminal prosecution are. *See e.g.* B. Gershman, Prosecutorial Misconduct, §1.8(a) & (d) (1992); Steele, "Unethical Prosecutors and Inadequate Discipline," 38 Sw. L. J 965 (1984). *See generally* Anno., "Disciplinary Action Against Attorney for Misconduct Related to Performance of Official Duties as Prosecuting Attorney", 10 A.L.R.4th 605 (1981).

The Fourth Circuit reasoned that the decision to withhold evidence pre-trial "would have occurred after Carter's arrest, but before his conviction," and therefore it must be "part of the presentation of the State's case." Appendix at 12. However, withholding evidence can not be part of the presentation of evidence. Only disclosed evidence can be part of the presentation of evidence in court. Moreover, as this Court made clear in *Buckley*, a prosecutor is not absolutely immune for all actions taken after an indictment. Even after charges are brought, "a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." 125 L.Ed.2d at 227 n. 5. And he may engage in administrative duties "that do not relate to an advocate's preparations for the initiation of a prosecution or for judicial proceedings." 125 L.Ed.2d at 226.

The preparation for presenting evidence in court clearly does not include withholding exculpatory evidence. Trial preparation involves the exercise of judgment and decision making in professionally analyzing the evidence and preparing to present it at trial. *Buckley v. Fitzsimmons*, 125 L.Ed.2d at 226. The decision to turn over exculpatory evidence, however, is not subject to a prosecutor's discretion. It is a mandatory requirement. *Brady v. Maryland, supra*. The ABA Code of Professional Responsibility mandates:

> "The prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

Ethical Considerations, E.C. 7-13. *See also* Disciplinary Rules, D.R. 7-103(B). Where there is a legitimate question, *in camera* review is available. *See e.g.* Edwards, "Professional Responsibilities of the Federal Prosecutor," 17 U. Rich. L. Rev. 511, 529 (1983). Thus, the decision to turn over exculpatory evidence is not part of the preparation for presenting evidence in court and does not implicate any discretionary "quasi-judicial" decision making of the prosecutor.

Moreover, civil liability under Section 1983 can only be maintained for willful violations of "clearly established" statutory or constitutional standards a reasonable person would have known. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1972); *Malley v. Briggs*, 475 U.S. 335, 341 (1986)(qualified immunity protects "all but the incompetent or those who knowingly violate the law"). Thus, only wilful withholding of clearly exculpatory evidence is actionable. In this case, for example, even Burch acknowledged that the evidence was "exculpatory," as did Beamer's expert

witnesses.

The purely administrative -- even ministerial -- act of disclosing materially exculpatory evidence is similar to the prosecutor's acts in *Allen v. Lowder*, 875 F.2d 82 (4th Cir. 1989). There the court refused to bestow absolute immunity on a prosecutor for obtaining a court order to continue the plaintiff's incarceration after his conviction was reversed. The court noted the prosecutor's post conviction acts were "at best" purely administrative.

The Fourth Circuit's opinion in this case also squarely conflicts with the Sixth Circuit's opinion in *Hilliard v. Williams*, 516 F.2d 1344 (6th Cir. 1975), which was cited with approval by Justice White in his concurring opinion in *Imbler*. There the Sixth Circuit held a state prosecutor liable for, among other things, withholding exculpatory evidence pre-trial. There an FBI report showing stains on a jacket and a curtain were not blood was withheld from the defendant resulting in her spending a year in jail.

Suppression of evidence by a prosecutor does not warrant absolute immunity any more than suppression of evidence by an investigator, such as Deputy Sheriff Beamer who was granted only qualified immunity in this case. Absolute immunity to the prosecutor for the same function which an investigator is granted only qualified immunity for would be anomalous and contrary to "one of the goals of our §1983 immunity jurisprudence: insuring parity of treatment among state actors engaged in identical functions." *Buckley v. Fitzsimmons*, 125 L.Ed.2d at 236 (Kennedy, J., concurring in part and dissenting in part). As this Court said in *Buckley*, when the functions are the same, the immunity "is also the same, i.e., qualified immunity only." 125 L.Ed.2d at 228.

Moreover, the judicial process is not available to correct suppression of evidence when it occurs because it is by definition not known to the court or the defendant at the time. Indeed, the judicial system is injured when evidence is withheld from it. *Imbler v. Pachtman*, 424 U.S. at 443 (White, J., concurring opinion). Absent Section 1983 liability, there is little deterrent to such gross abuses of prosecutorial power and subversion of the truth seeking function of the judicial process. Liability for damages caused by such unconstitutional conduct "has the very desirable effect of deterring such conduct." *Imbler v. Pachtman*, 424 U.S. at 442 (White, J., concurring opinion).

When exculpatory evidence first learned post conviction is withheld, any rationale that the decision is somehow part of the prosecutor's preparation for trial is obviated by the conclusion of the trial and the conviction of the defendant. Because the trial is over, the prosecutor's function can hardly be considered preparation for trial, much less part of the decision to charge. The trial advocate's role is over. The fact finding process is completed. The conviction is won. Thus, granting absolute immunity for the post conviction misconduct of withholding exculpatory evidence is even less justifiable than for pre-trial suppression of evidence.

Furthermore, there can be no post-trial motions or appellate issues involving the evidence which has been suppressed. Because the evidence has been withheld from the defendant and the court, there is no advocacy role for the prosecutor to play. The role of the courts to review post-conviction whether the defendant received a fair trial is also subverted by withholding exculpatory evidence learned post conviction.

The Fourth Circuit's ruling in absolutely immunizing suppression of exculpatory evidence first learned post-conviction squarely conflicts with the Seventh Circuit opinion in *Houston v. Partee*, *supra* holding prosecutors liable for withholding evidence first learned pre-trial. The Seventh Circuit affirmed the district court holding that prosecutors are not absolutely immune from Section 1983 liability for suppression of exculpatory evidence that they first learn of post-conviction and willfully withhold from defense counsel and the post-conviction court.

In *Houston v. Partee*, two plaintiffs (Houston and Brown) were convicted of murder based on questionable identifications. While their direct appeals were pending in the Illinois Appellate Court, the prosecutors discovered evidence corroborating Houston's testimony at trial and exonerating him of the murder. Like the present case, prosecutors did not disclose this to the court or to the criminal defendants until after the two wrongfully convicted men had developed the information from other sources. Meanwhile, again like Carter, Houston and Brown served four years in prison for a crime that they did not commit.

As in the present case, the defendant prosecutors in *Houston* contended they were entitled to absolute immunity because the plaintiffs' appeals were still pending when they learned of the exculpatory evidence; they argued the act of defending those appeals was part of the prosecution. In rejecting this argument, the Seventh Circuit noted that absolute immunity does not attach at the beginning of the prosecution and continue indefinitely.

The Fourth Circuit attempted to distinguish the Seventh Circuit's opinion in *Houston v. Partee* by seizing on the fact that

the prosecutors there were not "personally" prosecuting the appeal while, in the present case, Burch did participate in the appeal of Carter's conviction. This factual distinction makes no legal difference under this Court's "functional" test. Whether they were personally involved in the appeal at the time is immaterial to their duty to turn over such evidence to the defendant. Such duty derives from the ethical duty of lawyers to divulge such evidence whether in a judicial proceeding or otherwise. The duty of disclosure is not dependent on the prosecutor's role as advocate; rather it is related to the prosecutor's role as administrator of justice. *See e.g.* ABA Code of Professional Responsibility E.C.7-13, *supra*.

The fact that the prosecutors in *Houston v. Partee, supra,* were held liable for nondisclosure of exculpatory evidence first learned post conviction when they were <u>not</u> involved in the appellate process establishes that such duty derives not from their function as advocates, but rather from their function as administrators of justice.

The Fourth Circuit relied upon the notion that "although the trial had been completed, Burch's functions in representing the State in Carter's post-conviction motions and direct appeal very much implicated the judicial process." Appendix at 13. However, the withholding of evidence -- the function involved here -- was strictly extrajudicial; it involved no advocacy function, trial preparation, or court proceeding. It was the act of an administrator. None of the issues in the case through the direct appeal involved the Poppa evidence. In diverting the issue from the prosecutor's out-of-court conduct of withholding exculpatory evidence to his separate and distinct function in post-conviction judicial proceedings, the Fourth Circuit ignored this Court's observation that a prosecutor may be both an administrator and advocate at the same time. Immunity is not

predicated on his status, but rather on his function. The lower courts avoided any careful analysis of the function performed by prosecutor Burch in withholding the exculpatory Poppa evidence.

Accordingly, this Court should grant this petition for writ of certiorari to review the judgment of the Fourth Circuit in order to correct a grave misapplication of this Court's analysis of prosecutorial absolute immunity to withholding materially exculpatory evidence, to resolve a conflict between the Fourth Circuit and the Sixth Circuit (regarding immunity for suppression of evidence pre-trial) and the Seventh Circuit (regarding immunity for suppression of evidence first learned post-trial), and to address and remedy a serious national problem of prosecutorial withholding of exculpatory evidence which undermines the ability of the courts to administer justice to our citizens.

2. THE FOURTH CIRCUIT OPINION THAT PROSECUTOR BURCH IS ABSOLUTELY IMMUNE FOR CONSPIRACY TO FABRICATE TESTIMONY CONFLICTS DIRECTLY WITH THIS COURT'S OPINION IN *BUCKLEY V. FITZSIMMONS,* CONFLICTS WITH FIRST, SECOND AND SIXTH CIRCUIT OPINIONS, AND MUST BE CORRECTED TO PREVENT FURTHER MISAPPLICATION OF THE PROSECUTORIAL ABSOLUTE IMMUNITY STANDARD AND TO ADDRESS AND REMEDY A SERIOUS NATIONAL PROBLEM.

This Court held in *Buckley v. Fitzsimmons, supra*, that

"there is no common-law tradition of immunity for" fabrication of evidence. 125 L.Ed.2d at 227 n. 5. There, a prosecutor's alleged fabrication and conspiracy to fabricate bootprint evidence was held not absolutely immune because it was investigatory in nature. This Court noted that fabricating evidence was not part of a prosecutor's "professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial . . .." 125 L.Ed.2d at 226.

Based on the affidavit of Suzanne Culver, Carter claims that Burch conspired to fabricate testimony by coaching her to deny that Carole Carter stated that she was shot with "her own .38 caliber pistol." In her sworn affidavit, Suzanne Culver stated:

> Before the trial, the Commonwealth Attorney coached me on what I should say at trial. I was instructed by the Commonwealth Attorney not to say that Carole said 'Doug shot me with my .38,' even though I told him that Carole did say 'Doug shot me with my .38.'

J.A. 2. The true evidence would have established Carole's own knowledge at the time of the shooting that the weapon was her own pistol so as to suggest a self-inflicted gun shot wound and to rebut that she was the victim of an intruder and also to corroborate Carter's innocent knowledge later that morning that she was shot with a .38 caliber pistol.

Again, the Fourth Circuit misapplied this Court's "functional" test. While the presentation of such evidence in court is entitled to absolute immunity, as is the witness' testimony in court, *Briscoe v. LaHue*, 460 U.S. 325 (1983), the out-of-court fabrication of such evidence and conspiracy to do

so is not entitled to absolute immunity. The Court recognized this distinction in *Buckley* and noted that, if police solicit fabricated evidence, it is not absolutely immune. 125 L.Ed. at 228 n. 6. Thus, when the prosecutor solicits fabricated evidence, he is entitled to no more than the same consideration, i.e., qualified immunity only. "When the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same." 125 L.Ed.2d at 228.

There is a critical distinction between a prosecutor preparing a witness for trial, on the one hand, and coaching and instructing a witness what to say, on the other hand. In the former, the prosecutor is evaluating the evidence and planning for its clear and logical presentation in court, rather than conspiring to fabricate and soliciting the fabrication of evidence which does not exist, as in the latter. Every trial lawyer understands this distinction which is critical to the adversary system of justice.

In *Buckley* the fabrication occurred pre-indictment. But the timing of the fabrication is not material. Indeed, this Court noted in *Buckley* that even after charges are brought, "a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." 125 L.Ed.2d at 227 n. 5 (majority opinion). The dissent in *Buckley* also noted that after an indictment, "a prosecutor might act to further police investigative work say by finding new leads, in which case only qualified immunity should apply." 125 L.Ed.2d at 236 (Kennedy, J., concurring in part and dissenting in part).

The Fourth Circuit opinion is in conflict with the Second Circuit opinion *San Filippo v. U.S. Trust Co. of New York, Inc.*, 737 F.2d 246 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985). There the court held that absolute immunity does not

extend "to cover extra-judicial conspiracies between witnesses and the prosecutor to give false testimony." *Id.* at 255.

The Fourth Circuit is also in conflict with the First Circuit. In *Malachowski v. City of Keene*, 787 F.2d 704, 711 (1st Cir), *cert. denied* 479 U.S. 828, *rehearing denied*, 479 U.S. 1022 (1986) the court noted that "proper allegations of conspiracy could overcome the immunity" afforded by *Imbler* for prosecutors.

In *Hilliard v. Williams*, 516 F.2d 1344 (6th Cir. 1975), the court held that a state prosecutor was liable not only for withholding exculpatory evidence, but also for "instruct[ing]" an investigator not to mention an FBI report that stains on a jacket and a curtain were not blood unless specifically questioned about it. *Cf. Alioto v. City of Shively*, 835 F. 2d 1173 (6th Cir. 1987)(extending *Briscoe* immunity to testifying witness, but not to nontestifying parties, in Section 1983 conspiracy action). Thus, Sixth Circuit opinions directly conflict with the Fourth Circuit opinion that a prosecutor is absolutely immune for the out-of-court conspiracy to fabricate witness testimony.

Thus, a prosecutor's absolute immunity from civil liability for presenting perjured testimony in court does not extend to the out-of-court conspiracy to fabricate such testimony and the solicitation of false testimony pretrial.

Accordingly, this Court should grant this Writ to correct a substantial misapplication of the "functional" test for determining prosecutorial absolute immunity, to resolve a conflict between the Fourth Circuit and the First, Second and Sixth Circuits, and to address and remedy the grave problem of prosecutors conspiring to fabricate and fabricating evidence pre-trial.

CONCLUSION

1. The Fourth Circuit erred in extending the scope of absolute immunity to prosecutor Burch beyond this Court's holdings in *Imbler*, *Burns*, and *Buckley*. Withholding materially exculpatory evidence is not protected by absolute immunity because the prosecutor is functioning as an administrator, rather than an advocate, in not disclosing it. The common-law existing in 1871 does not support engrafting immunity for this function on Section 1983 which does not allow for any immunity by its terms. Because the prosecutor has not carried his burden of demonstrating the existence of immunity for this conduct in 1871, absolute immunity does not exist.

Policy also does not support absolute immunity. A prosecutor's independence of judgment and "quasi-judicial" decision making would not be constrained by imposing liability for suppression of materially exculpatory evidence. On the other hand, potential civil liability would deter prosecutorial abuse and encourage fuller disclosure of exculpatory evidence and thereby prevent injury to the judicial process and to our citizens.

Suppression of materially exculpatory evidence first learned post-conviction warrants the extraordinary cloak of absolute immunity even less than when evidence is suppressed pre-trial. After the conviction, the prosecutor's function in preparing and presenting evidence at trial is at an end. Post-conviction motions and appeals can not involve any evidence suppressed. Absent Section 1983 liability, there is no judicial oversight to govern this out-of-court, post-conviction abuse of prosecutorial power. And the function of the courts to right an unjust conviction by consideration of newly discovered exculpatory evidence learned post-conviction is subverted.

2. The claim of prosecutor Burch conspiring to fabricate evidence prior to trial is also not protected under *Buckley*. Conspiracy to manufacture evidence, as distinct from presenting the evidence in court, is not conduct protected from civil liability because it is investigatory in nature.

For the foregoing reasons, this Court should grant a Petition for a Writ Certiorari to the Fourth Circuit.

Respectfully submitted,

WILLIAM DOUGLAS CARTER

By: John S. Edwards
Of Counsel

John S. Edwards, Esq.
Attorney At Law
P.O. Box 1179
Roanoke, Virginia 24006-1179
(703) 985-8625 (telephone)
(703) 345-9950 (facsimile)

Counsel for Petitioner